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No. 90-1122

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

JEROME GOLOCHOWICZ,

Petitioner

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Regarding Issues 1, 2 and 3.

The respondent cites numerous Supreme Court cases upholding "open murder" statutes. These cases involve the question of whether premeditated murder is charged when the prosecutor charges "open murder" or murder. None involve the question of charging murder, and not charging larceny, and then, at the end of trial, adding the charge of felony murder in the course of a larceny.

With regard to Michigan cases, the respondent cites *People v. Page*, 198 Mich. 524 (1917). In *Page*, the written charge was murder, and the conviction was for felony murder in the course of a robbery. However, in *Page*, the prosecutor repeatedly informed the defense orally in court, before and during trial, that this was a charge of felony murder in the course of a robbery. The defendant in *Page* had notice that this Petitioner did not have. *Page* is therefore nothing like this case.

Further, *Page* was decided decades before the cases recognizing the constitutional right to notice of the charge in state court criminal proceedings.

The respondent cites some Michigan cases that do not involve felony murder prosecutions at all, and are therefore irrelevant. *Brownell v. People*, 38 Mich 372 (1878) (second degree murder); *People v*

Johnson, 427 Mich 98 (1986) (second degree murder).

The respondent cites *People v McKinney*, 65 Mich App 131(1975) and *People v William Turner*, 26 Mich App 632 (1970). These cases permit the practice of charging open murder and convicting on felony murder. However, in *Turner*, the defendant was advised of the felony murder charge from his first trial (contrast the instant case, where the first trial involved premeditated murder only). In *McKinney*, the Court wrongly applied *People v Page*, even though the Court in *Page* relied on the oral notice to the defendant, which oral notice was absent in *McKinney*.

Most importantly, however, the cases of *McKinney* and*Turner* are no different than the Ohio and Nevada cases where the state courts, like in Michigan, wrongly upheld the practice of charging murder and convicting of felony murder in the course of crimes unspecified before trial.

In *Turner v. State*, 605 P.2d 1140 (Nev. 1980), the Nevada Supreme Court held: "It is permissible to instruct regarding felony murder even though felony murder is not pleaded."

Two years later, in the *Givens* case itself, the claim that it was improper to charge murder and then convict on murder by torture was rejected by the Nevada Supreme Court as being unworthy of discussion. *Givens v. State*, 655 P.2d 533 (Nev. 1982).

Similarly, Ohio courts have also approved the

practice found unconstitutional by the Sixth and Ninth Circuits in *Watson v. Jago*, 558 F.2d. 330 (6th Cir. 1977) and *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986). See *Bryant v. State*, 192 N.E. 795, 48 Ohio App. 208 (1933). While the *Watson* case was unreported in the Ohio state courts, it is clear that the Ohio courts approved the practice which the Sixth Circuit held to be unconstitutional.

The existence of state court cases approving the practice in question did not legalize the practice in *Watson v. Jago* or in *Givens v. Housewright*. They therefore cannot legitimize the practice here. There simply is no difference separating Michigan law from Ohio and Nevada law. All three states tried to get away with the practice employed here. Under the present ruling, Michigan can get away with it, while Ohio and Nevada cannot. This difference in the administration of justice is a compelling reason for the granting of certiorari.

Further, in this case, in contrast to the cases cited by the respondent, we have the affirmative misrepresentation by the prosecutor that the charge in the case required proof of premeditation and deliberation. No case has ever approved that sort of trickery to prevent the defendant from putting on a full defense, until now.

Respondent also cites *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977), for the proposition that "a person

can be convicted of first degree felony murder even when the indictment charges only first degree premeditated murder." (R. Br. 21). This description of *Blake* is totally inaccurate. In *Blake*, the charge was premeditated murder, and the conviction was for premeditated murder. The issue in *Blake* was whether evidence of rape and robbery was admissible to show premeditation. Admissibility of evidence is not at issue in this case. Petitioner does not claim that it was improper to introduce evidence that a larceny may have occurred.

In attempting to distinguish *Givens v. Housewright*, the repondent notes that the charge of "murder by torture" of which Givens was convicted does not require intent to kill. (Resp. Br. 21-22). However, felony murder in the course of a larceny also does not require intent to kill. *People v Aaron*, 409 Mich 672 (1980).

There simply is no reasonable basis on which to distinguish *Givens v. Housewright* from the instant case.

Respondent claims that the charge in this case was "open murder." In fact, the word "open" does not appear in any charging document. However, it would make no difference if it did appear.

M.C.L. 750.316, the first degree murder statute, contains 19 different crimes. A criminal defendant has the right to know which of the 19 are being

charged before trial starts, not after the proofs are closed. Under Respondent's theory, every time murder is charged in Michigan, defense counsel during trial has to demonstrate that the killing was not in the course of an arson or rape or burglary, simply to guard against the possibility that the prosecutor would decide at the close of proofs that felony murder in the course of an arson or a rape or burglary would be the charge.

The respondent stresses that at trial Petitioner used a defense (no proof of his involvement in the killing) which would have applied to either premeditated murder or to felony murder in the course of a larceny. (Resp. Br. 22-23). This **demonstrates** the prejudice, rather than refutes it. Because misled by the charging document, and the statements of the prosecutor, the defense did forego the opportunity to employ additional defenses which are relevant to felony murder in the course of a larceny, but are not relevant to premeditated murder.

The issue is simple: does the defendant get to know the charges before trial starts, or only after the close of proofs?

Conclusion.

Petitioner Jerome Golochowicz respectfully submits that for the reasons stated in the Petition for

Certiorari, as supplemented above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

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